

ESTTA Tracking number: **ESTTA560585**

Filing date: **09/20/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| | |
|------------------------|---|
| Proceeding | 91204070 |
| Party | Plaintiff Brody Chemical Company, Inc. |
| Correspondence Address | DAVID G BRAY DICKINSON WRIGHT/MARISCAL WEEKS 2901 N CENTRAL STE 200 PHOENIX, AZ 85012-2705 UNITED STATES dbray@dickinsonwright.com, sclaus@dickinsonwright.com |
| Submission | Other Motions/Papers |
| Filer's Name | David G. Bray |
| Filer's e-mail | dbray@dickinsonwright.com, karendt@dickinsonwright.com |
| Signature | /David G. Bray/ |
| Date | 09/20/2013 |
| Attachments | Notice of Errata.pdf(585245 bytes) |

David G. Bray, Esq. (#14346)
Scot L. Claus, Esq. (#014999)
DICKINSON WRIGHT/MARISCAL WEEKS
2901 North Central Avenue, Suite 200
Phoenix, Arizona 85012-2705
Phone: (602) 285-5000
Fax: (602) 285-5100
dbray@dickinsonwright.com
sclaus@dickinsonwright.com

Attorneys for Opposer

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Brody Chemical Company, Inc.

Opposer,

v.

Goldthorpe, Tammy L. fka Tammy Price,

Applicant.

OPPOSITION NO. 91/204,070

Mark: Slippery Wizard
Serial No. 85/099,334

NOTICE OF ERRATA

Opposer Brody Chemical Company, Inc. hereby gives notice that it inadvertently failed to attach the exhibits to their Opening Brief that was filed on September 16, 2013. Attached are the Exhibits "A" and "B" that are referred to in Opposer Brody Chemical Company, Inc.'s Opening Brief.

CERTIFICATE OF DEPOSIT

I hereby certify that this correspondence is being deposited with the Trademark Trial and Appeal Board via ESTTA on the date indicated below:

Date of Deposit 9/20/2013

/David G. Bray/

1 DATED this 20th day of September, 2013.

2 **DICKINSON WRIGHT/MARISCAL WEEKS**

3
4 By David G. Bray/

5 David G. Bray

6 Scot L. Claus

7 2901 North Central Avenue, Suite 200

8 Phoenix, Arizona 85012-2705

9 Attorneys for Opposer

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

Nathan S. Winesett
 AVERY, WHIGHAM & WINESETT, P.A.
 P.O. Box 3277
 Duluth, MN 88508

/David G. Bray/

-3-

EXHIBIT A

COPY OF TRANSCRIPT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

| | | |
|----------------------------------|---|----------------------------|
| Brody Chemical Company, Inc., |) | Deposition of: |
| |) | |
| Opposer, |) | <u>TAMMY L. GOLDTHORPE</u> |
| |) | |
| vs. |) | |
| |) | |
| Goldthorpe, Tammy L. aka |) | Opposition No. |
| Tammy Price, |) | 91/204,070 |
| |) | |
| Applicant. |) | |

May 20, 2013 * 1:30 p.m.

Location: CitiCourt
236 South 300 East
Salt Lake City, Utah

Reporter: Ashley Money, RPR
Notary Public in and for the State of Utah



CITICOURT

THE REPORTING GROUP

236 South 300 East
Salt Lake City, Utah 84111

PH: 801.532.3441 FAX: 801.532.3414 TOLL FREE: 877.532.3441

1 A. Correct.

2 Q. And for at least some of your
3 compensation, they took taxes out, correct?

4 A. Yes, for everything but the Slippery
5 Wizard.

6 Q. Okay. And you were -- you received a W-2
7 at the end of the year from Brody Chemical, correct?

8 A. Yes.

9 Q. And when you filed your taxes, Brody
10 Chemical was listed as your employer, correct?

11 A. Correct.

12 Q. You didn't sell -- prior to joining Brody
13 Chemical again in October 2004, you never sold an
14 asphalt release agent under the name Slippery Wizard,
15 correct?

16 A. Correct.

17 Q. It was called ASA --

18 A. 12. I actually came up with the mark to
19 go into Brody.

20 Q. I'll have you look at Exhibit 6 that she's
21 got over there. Ms. Goldthorpe, I've handed you
22 what's been previously marked as Exhibit 6, which is
23 a Brody Chemical earning statement for the period
24 ending 5/31/2005. Is this something that you
25 provided to your lawyer?

1 A. Yes.

2 Q. So you recognize that this is a true and
3 correct copy of an earning statement that you
4 received from Brody Chemical for this pay period?

5 A. Correct.

6 Q. And, again, at least for certain of your
7 compensation, you were treated as -- you were
8 compensated as an employee, correct?

9 A. Say that again.

10 Q. Bad question. Sorry.

11 A. Yeah.

12 Q. For at least certain -- for at least a
13 portion of the compensation that you received from
14 Brody Chemical and this pay period, you were paid as
15 an employee of Brody Chemical, correct?

16 A. For some of it.

17 Q. Yes. Now, Mr. Winesett asked questions
18 to, I think, your former manager, Matt, regarding the
19 "Other." Do you see that --

20 A. Yes.

21 Q. -- the 1,515.25?

22 A. Yes.

23 Q. And Matt said, basically, he didn't know
24 what it was. He had suspicions, but he didn't
25 remember. What do you believe that "Other" to be?

1 A. My Slippery Wizard product.

2 Q. Okay. Would that have been overrides, the
3 \$1 per gallon on Slippery Wizard?

4 A. Yes.

5 Q. Okay. What about your direct sales of
6 Slippery Wizard where you were paid a 50 percent of
7 gross margin?

8 A. That was separate.

9 Q. Was that paid, for lack of a better word,
10 as though you were an employee of Brody Chemical?

11 A. Yes.

12 Q. So only the -- what the Exhibit 4 refers
13 to is the override would appear in the "Other" column
14 on your payroll statements?

15 A. Correct.

16 Q. So if you sold the -- if you sold the
17 Slippery Wizard product yourself, it was treated as
18 regular commission income to you, correct?

19 A. Yes.

20 Q. Just like any other Brody Chemical product
21 you might have sold around that time, correct?

22 A. Yes.

23 Q. How was the -- what tax documents did you
24 receive from Brody Chemical for the "Other" at the
25 end of the year?

1 A. They just -- they had it on a separate
2 line.

3 Q. Okay. Did you receive a 1099?

4 A. No.

5 Q. So during the time you were associated
6 with Brody Chemical, you never received a 1099 from
7 Brody Chemical; is that correct?

8 A. That's correct.

9 Q. Always just a W-2?

10 A. Yes.

11 Q. Prior to joining Brody Chemical, had you
12 had experience working as a sales representative for
13 other companies?

14 A. Yes.

15 Q. Okay. And at least part of your job when
16 you were at Brody Chemical was working as a sales
17 representative, correct?

18 A. The first time, around 1999.

19 Q. Okay. So --

20 A. When I came back in 2004, I did -- I was
21 treated as a private contractor. I did what I
22 wanted. I didn't have any of the rules that anyone
23 else had. I agreed to sell some of their products in
24 my existing client accounts that I had that I had
25 brought, and then I developed more clients -- my own

1 clients as well as helping other people build theirs.

2 Q. All right. Did Brody Chemical give you a
3 business card?

4 A. Yes.

5 Q. And do you recall what title you had on
6 that business card?

7 A. No.

8 Q. During the time October -- well, when did
9 you finally leave -- I'm trying to use words that
10 aren't controversial. But when did your
11 relationship -- employment relationship, independent
12 relationship, when did that end with Brody Chemical
13 the second time?

14 A. The second time?

15 Q. Yeah.

16 A. 2011.

17 Q. Okay. In January?

18 A. Yes.

19 Q. Okay. During the time October 2004 until
20 January of 2011, did you use any business cards other
21 than business cards that identified you as being
22 associated with Brody Chemical?

23 A. No.

24 Q. One of the exhibits your counsel showed
25 you was, I think, Exhibit 16. Sometimes my

1 handwriting is so poor. You can take a look at it if
2 you'd like. I just have a few questions.

3 A. Okay.

4 Q. It was a proposal, asphalt release program
5 in 2002 to RCAI.

6 A. Yes.

7 Q. Did you ever become employed by RCAI?

8 A. Yes.

9 Q. And during what time were you -- during
10 what time frame were you employed by RCAI?

11 A. From the time I started.

12 Q. When was that?

13 A. It was 2001.

14 Q. So you worked as an employee for RCAI from
15 approximately 2001 until when?

16 A. 2003.

17 Q. Okay.

18 A. The end of 2003.

19 Q. Did you sign any written agreement with
20 RCAI regarding the asphalt release product that you
21 developed?

22 A. Yes.

23 Q. What were the terms of the written
24 agreement?

25 A. Two -- if I left the company, then what I

1 would need to do is give it a time frame, a break, so
 2 that I didn't -- like I couldn't go -- I didn't
 3 immediately go right into Brody and start selling. I
 4 think it was like a waiver period of six months to a
 5 year, if I remember correctly.

6 Q. So are you talking about a noncompete?
 7 You signed an agreement that had a noncompete or are
 8 you talking about an agreement that governed their
 9 rights to use the ASA-12 product?

10 A. Correct.

11 Q. The latter?

12 A. The latter.

13 Q. The only time that you sold the ASA-12
 14 product was when you were employed by RCAI, correct?

15 A. Correct.

16 Q. And the only time you sold the Slippery
 17 Wizard product was when you were employed or had a --
 18 when you were -- strike that.

19 The only time that you sold the Slippery
 20 Wizard asphalt release product for Brody is when you
 21 had your continuing employment -- or you say
 22 independent contractor relationship with them,
 23 correct?

24 A. No. I actually still -- I sold some --
 25 had a relationship with a gentleman in Texas that I

1 was working with to continue the product.

2 Q. Is it being sold under the Slippery Wizard
3 name and mark?

4 A. No.

5 Q. So you're selling -- after you left Brody
6 Chemical in January of 2013, you've sold an asphalt
7 release product containing your formula to an entity
8 in Texas?

9 A. No. I'm in negotiation with them, but I
10 can't do anything until I clear up my mark.

11 Q. Okay. So in response to my prior -- just
12 to clarify, after January 2011, have you sold any
13 asphalt release product, period?

14 A. Through Brody Chemical.

15 Q. Okay.

16 A. They're still selling the product.
17 They're still using my mark. So yeah, it's still
18 going.

19 Q. Okay. Fair enough. Other than whatever
20 sales of the Slippery Wizard product that Brody
21 Chemical might have had after January 2011, have you
22 been involved in any sales -- other sales of an
23 asphalt release product after that date?

24 A. No.

25 Q. And what's the Texas entity you've had

1 some negotiations with?

2 A. They're interested in the product and the
3 mark, but I was hoping to take care of, you know --
4 get an okay with Brody; but it's not looking that
5 way, so I'll see where it goes.

6 Q. When's the last time you've been in
7 communication with a Texas company regarding the
8 formula or the mark?

9 A. About six months ago.

10 Q. To your knowledge, the Slippery Wizard
11 product being sold by Brody Chemical in the labeling
12 of the product, it's never been labeled Tammy
13 Goldthorpe's Slippery Wizard, correct?

14 A. That's correct.

15 Q. And the specimen that you or your attorney
16 submitted with your trademark application to the
17 United States Patent and Trademark Office, that
18 demonstrated or that showed a Brody Chemical use of
19 the Slippery Wizard mark, correct?

20 A. Yes.

21 Q. Nowhere -- we'll have a look at Exhibit 4.
22 Exhibit 4 doesn't use the word "royalty," correct?

23 A. Correct.

24 Q. In your experience, what is an override
25 commission?

1 A. I look at it as a royalty. I haven't
2 heard it before this.

3 Q. Okay. So in your experience, an override
4 commission is synonymous of royalty?

5 A. It's residual income. You bring something
6 and then you get residual income on that.

7 Q. Are you aware of whether or not the
8 formula being used in Brody Chemical's Slippery
9 Wizard product today is the same formula that you
10 developed in 2001, 2002?

11 A. As of today?

12 Q. Yes.

13 A. I have no idea.

14 Q. How about as of January 2011?

15 A. As far as I know.

16 Q. Okay. Did the -- was the primary
17 ingredient or product of your asphalt release product
18 yellow grease?

19 A. Not the primary ingredient, but it was a
20 component.

21 Q. Did the formula of -- that you developed
22 in -- was it 2001 --

23 A. '2.

24 Q. -- 2002 for an asphalt release product,
25 did it contain a surfactant?

1 A. Yes.

2 Q. Do you know what the surfactant was?

3 A. 9 and 9.

4 Q. Did you say 99 or 9 and 9?

5 A. 9 and 9.

6 Q. What's that? I'm just curious.

7 A. It's a component that holds all of the
8 components together.

9 Q. Okay. You have a high school education,
10 correct?

11 A. Yes.

12 Q. Any college?

13 A. No.

14 Q. No formal training in chemistry?

15 A. No.

16 Q. Mr. Liddiard testified when he was deposed
17 by me that he had a master's degree in analytical
18 chemistry, I believe. And your former supervisor,
19 Matt, testified no, he doesn't have a chemistry
20 degree.

21 Do you know one way or the other whether
22 or not Mr. Liddiard has a degree in chemistry?

23 A. He actually has said that he -- he said to
24 Buzz and to me that he does not have a chemistry
25 degree.

1 Q. Okay. But he has a degree in something
2 else?

3 A. Yeah.

4 Q. Do you know what that is?

5 A. Something to do with dental.

6 Q. Interesting. Okay. Exhibit 4, the
7 written agreement between yourself and Brody
8 Chemical, there's no provisions in this agreement,
9 Exhibit 4, dealing with the quality of the Slippery
10 Wizard product, correct?

11 A. Correct.

12 Q. There's no provision in Exhibit 4 that
13 gives you the right to control the quality of the
14 Slippery Wizard product, correct?

15 A. Correct. Never had a problem with me
16 going back there and doing that. The problem was
17 with him trying to take the money away.

18 Q. Well, let's talk about that a little bit.
19 I'm so bad with names. Sometimes I swear I have
20 early Alzheimer's. The gentleman that testified
21 before lunch --

22 A. Dennis.

23 Q. -- Dennis, talked about the increase in
24 commodity price, yellow grease.

25 A. Yeah.

1 A. No. They didn't even compare to each
2 other.

3 Q. Did you ever have that concern?

4 A. No. No.

5 Q. When Brody was making sales of White
6 Wizard but not paying you any override for White
7 Wizard sales, did you author any writings to Brody
8 saying, "That's my trademark. What's going on? I
9 should be paid on that"?

10 A. No.

11 Q. Did you ever raise that issue, generally
12 speaking, of whether you should have been paid
13 anything on White Wizard sales prior to the
14 renegotiation of the \$1 per gallon override on
15 Slippery Wizard?

16 A. No. We weren't selling anything.

17 Q. Well, that's -- that's hyperbole, isn't
18 it, because they were selling some White Wizard,
19 correct?

20 A. Correct.

21 Q. From the time period of October 2004 to
22 January 2011, you never paid any self-employment
23 taxes, correct?

24 A. Yes, I did.

25 Q. You did? What did you pay?

1 A. I paid taxes.

2 Q. No. You never paid the employer side of
3 FICA, correct?

4 A. No.

5 Q. Just so the record is clear, true or
6 false, you paid the employer side of FICA at any time
7 between October 2004 and January 2011?

8 A. True.

9 MR. BRAY: Will you read back my question?
10 All the double negatives are getting me. I just want
11 to make sure I have a clear record.

12 THE COURT REPORTER: "Just so the record
13 is clear, true or false, you paid the employer side
14 of FICA at any time between October 2004 and
15 January 2011?"

16 Q. (BY MR. BRAY) So you did pay employer
17 side FICA during that time?

18 A. No, I did not. Sorry.

19 Q. Okay. Now I think it's a clear record.
20 Thank you.

21 Mrs. Goldthorpe, just give me one second
22 to look through the various exhibits, many of which I
23 have not seen before, and see if I have any other
24 questions. I think we're about done.

25 Exhibit 15, if you could grab that in

1 Q. Do you know whether you intend to
2 introduce into evidence any writings between yourself
3 and anybody at Brody Chemical prior -- that are dated
4 prior to December 31, 2010 that refer to the override
5 that you were paying on Slippery Wizard sales as a
6 royalty?

7 A. Do I intend on putting -- what? Could you
8 repeat the question, please?

9 Q. Do you know whether or not you intend to
10 introduce any document into evidence that's dated
11 prior to December 31, 2010 that refers to the
12 override commission that you were paid by Brody
13 Chemical on Slippery Wizard sales as a "royalty"?

14 A. Not anything else, no.

15 Q. Okay. Have you seen any such document?

16 A. Huh-uh (negative).

17 Q. No? You have to be verbal.

18 A. Sorry.

19 Q. So have you seen any such document?

20 A. Just what we've presented, I believe.

21 Q. Okay.

22 MR. BRAY: I don't have anything further.

23 Thank you.

24

25

EXHIBIT B

COPY OF TRANSCRIPT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

| | | |
|--|---|----------------------|
| Brody Chemical Company, Inc., |) | Deposition of: |
| Opposer, |) | <u>MATT FORSGREN</u> |
| vs. |) | |
| Goldthorpe, Tammy L. aka Tammy Price, |) | Opposition No. |
| Applicant. |) | 91/204,070 |

May 20, 2013 * 10:30 a.m.

Location: CitiCourt
236 South 300 East
Salt Lake City, Utah

Reporter: Ashley Money, RPR
Notary Public in and for the State of Utah



CITICOURT

THE REPORTING GROUP

236 South 300 East
Salt Lake City, Utah 84111

PH: 801.532.3441 FAX: 801.532.3414 TOLL FREE: 877.532.3441

1 A. I have no idea.

2 Q. And what's your present position with
3 Rhinehart Oil?

4 A. I'm the general manager of the chemical
5 division.

6 Q. Does Rhinehart sell, generally speaking,
7 products that are competitive with products sold by
8 Brody?

9 A. Yes.

10 Q. Are you familiar today in your position
11 with Rhinehart Oil as to the asphalt release agents
12 that are in the market?

13 A. No.

14 Q. To your knowledge, has anybody sold a
15 product under the name Slippery Wizard except Brody
16 Chemical?

17 A. No.

18 Q. So just to clarify for the record, you're
19 not aware of anybody selling a product called
20 Slippery Wizard except the product that was sold by
21 Brody Chemical?

22 A. Not to my knowledge.

23 Q. Did you make any effort to reduce whatever
24 the agreement was that you testified you reached with
25 Tammy Price to writing?

1 A. Yes.

2 Q. And was there a writing?

3 A. Yes.

4 Q. And I'm handing you what's been marked as
5 Exhibit 4. Is Exhibit 4 the writing?

6 A. Yes. I wasn't present during the time of
7 this document. It was all verbal when we initiated
8 with Tammy.

9 Q. Okay. Did you play any role in
10 negotiating that document, Exhibit 4?

11 A. Yes, the dollar a gallon override.

12 Q. Let me be clear. Separate from the terms
13 of the agreement, did you play any role going back
14 and forth with Tammy with regard to this piece of
15 paper?

16 A. Not the piece of paper. It was all
17 verbal.

18 Q. Now, you testified, looking at Exhibit 8,
19 regarding certain products that Brody sold that were
20 private labeled.

21 A. Yes.

22 Q. And that means the product was kind of
23 purchased off the shelf from the third party and then
24 Brody had permission from that party to put their own
25 label on it?

1 A. Correct.

2 Q. Do you know whether -- and I think you
3 gave me a couple of examples of adhesive spray
4 aerosol; is that right?

5 A. Correct.

6 Q. Were you familiar with the contracts that
7 Brody entered into with those third parties to
8 private label their goods, private --

9 A. No.

10 Q. Do you know whether or not any of those
11 contracts were verbal?

12 A. I have no idea. I wasn't involved with
13 those contracts, so --

14 Q. Fair enough. Do you know whether or not
15 Brody paid for the product it purchased and then sold
16 or whether Brody paid some sort of commission or
17 royalty of a certain amount per gallon with regard to
18 other third-party products?

19 A. I have no idea. I wasn't involved with
20 any of those negotiations.

21 Q. Fair enough. You've said when you were
22 the national sales representative for Brody Chemical
23 one of your duties was to hire and train new sales
24 representatives.

25 A. Correct.

1 Q. And you did hire Tammy Price as a sales
2 representative, correct?

3 A. Correct.

4 Q. And she became employed by Brody Chemical
5 as a sales representative in approximately
6 October 2004, correct?

7 A. Yes.

8 Q. There was no doubt in your mind as to the
9 fact that she was an employee of Brody Chemical,
10 correct?

11 MR. WINESETT: Objection, legal
12 conclusion.

13 A. Yes. She worked for Brody.

14 Q. (BY MR. BRAY) Going back to Exhibit 4,
15 Matt, you talked about having verbally negotiated the
16 dollar per gallon. Remember that?

17 A. Yes.

18 Q. Did you verbally negotiate or -- strike
19 that.

20 Did you negotiate with Ms. Price the deal
21 term .3?

22 A. No.

23 Q. Is it your understanding that that term
24 was negotiated between Jon Liddiard and Tammy Price?

25 A. No.

1 Q. You don't know where that term came from,
2 the splitting of travel expenses?

3 A. No.

4 Q. Fair enough. I can only ask you what you
5 do know.

6 A. Yeah.

7 Q. Were there any terms with regard to the
8 verbal agreement -- so -- strike that.

9 Was it your understanding that the verbal
10 agreement was in place from the beginning, October of
11 2004, up until the time that Exhibit 4 was executed?

12 A. Yes.

13 Q. Were there any other terms of your verbal
14 agreement with Ms. Price/Ms. Goldthorpe that aren't
15 reflected in Exhibit 4?

16 A. Not that I'm aware of.

17 Q. When you hired -- during your term as the
18 national sales manager for Brody Chemical, when you
19 hired new sales representatives, did you have them
20 sign a sales representative agreement?

21 A. Yes.

22 Q. Did you have Ms. Price sign a sales
23 representative agreement with Brody?

24 A. She declined to sign it.

25 Q. Did she say why?

1 A. No, just she wasn't comfortable with the
2 contract.

3 Q. Okay. But did she identify any particular
4 points?

5 A. No.

6 Q. Did you have any discussions with anybody
7 at Brody regarding her not being comfortable with the
8 standard sales representative agreement?

9 A. Jon Liddiard, the owner.

10 Q. Describe for me that conversation.

11 A. I just let him know she wasn't comfortable
12 with the contract and she wasn't comfortable signing
13 it.

14 Q. Okay. If you look at Exhibit 8, page 6,
15 which is the Brody catalog, in Exhibit 8, the
16 Slippery Wizard product is not identified as Tammy
17 Goldthorpe's Slippery Wizard product, correct?

18 A. Correct.

19 Q. During the time that you were the national
20 sales representative for Brody Chemical, it's true
21 that Brody Chemical did not label any of its asphalt
22 release products Tammy Goldthorpe's Slippery Wizard?

23 A. Correct.

24 Q. Brody just labeled the product Slippery
25 Wizard?